IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33879

STATE OF IDAHO,	)	
	)	**2008 Opinion No. 20**
Plaintiff-Respondent,	)	
	)	**Filed: February 28, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
KATHLEEN ANN BLANC,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Jerome County. Hon. John K. Butler, District Judge.

Order revoking probation and reinstating previously suspended unified sentence of ten years, with a minimum period of confinement of two years, for felony injury to a child, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Kathleen Ann Blanc appeals from the order revoking probation and reinstating previously suspended unified sentence of ten years, with a minimum period of confinement of two years, for felony injury to a child. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Blanc was charged with lewd and lascivious conduct for sexual acts she was alleged to have committed with her daughter. Pursuant to a plea agreement, Blanc pled guilty to an amended charge of felony injury to a child. I.C. § 18-1501(1). The district court imposed a unified ten-year sentence, with a minimum period of confinement of two years, but retained jurisdiction for 180 days. The district court reviewed Blanc's evaluation after the first period of retained jurisdiction and ordered another 180-day period of retained jurisdiction. After the

second period of retained jurisdiction, the district court suspended Blanc's sentence and placed her on probation for five years.

A year and ten months later, the state filed a report of probation violations against Blanc. A hearing was held and the district court determined Blanc violated several conditions of her probation. The district court revoked probation and ordered execution of the underlying sentence. Blanc appeals.

II.
ANALYSIS

A. Jurisdiction and Authority for a Second Rider

As an initial matter, we must address the state's contention that the district court lacked jurisdiction to order a second rider in Blanc's case without having first put her on probation and that Blanc's appeal is therefore untimely. Idaho Code Section 19-2601 governs commutation, suspension, and withholding of sentences, and includes subsections on retained jurisdiction and probation. Subsection (4) was modified in 1998 and now provides, in relevant part, that "the court in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case." I.C. § 19-2601(4). The state argues that this subsection authorizes a court to order a second period of retained jurisdiction only if the defendant is first placed on probation at the end of the initial period of retained jurisdiction. In this case, the district court retained jurisdiction for 180 days. At the end of those 180 days, and without placing Blanc on probation, the district court ordered another 180-day period of retained jurisdiction. The state contends that the district court did not have the statutory authority to order the second period of retained jurisdiction without first placing Blanc on probation. Therefore, the state argues that Blanc's appeal is untimely because the time in which to file an appeal began to run at the end of the first period of retained jurisdiction.

This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the

language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation, which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Constructions of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).

We begin by noting that the above-quoted language from I.C. § 19-2601(4) is not limiting. It does not say that a court must place a defendant on probation before ordering the second period of retained jurisdiction. Rather, it appears to use the phrase "after a defendant has been placed on probation in a case" as an example of when, in most cases, a second rider would be ordered. To the extent that I.C. § 19-2601(4) is arguably ambiguous as to whether a defendant must be placed on probation before a second period of retained jurisdiction is ordered, we evaluate and give effect to the legislative intent behind the bill enacting the statute.

The language dealing with a second period of retained jurisdiction was added to subsection (4) of I.C. § 19-2601 in March 1998. The language allowing a second period of retained jurisdiction was added to provide courts with more flexibility in sentencing options. Specifically, the Statement of Purpose for Senate Bill 1300, Section 19-2601(4), states that "this bill, if enacted, will clarify that a court may sentence a defendant to more than one period of retained jurisdiction in a case thereby giving the judge added flexibility in fashioning an appropriate sentence."

Interpreting I.C. § 19-2601(4) as requiring a court to place a defendant on probation for a trivial period of time before allowing a second period of retained jurisdiction is directly contrary to the statute's purpose, which is to give courts added flexibility in sentencing. The interpretation advocated by the state would also lead to an absurd result of requiring the state to transport the inmate to the district court to be placed on probation for the sole purpose of immediately returning him or her to the retained jurisdiction program. We conclude that I.C. § 19-2601(4) does not require that a defendant serve a period of probation before a second retained

jurisdiction can be ordered. Therefore, we conclude that the district court had authority to order the second period of retained jurisdiction and that Blanc's appeal is timely.

B. Revocation of Probation

The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *State v. Hood*, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); *State v. Lee*, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990).

Blanc argues that the district court abused its discretion in failing to consider whether the sentence previously pronounced was appropriate or whether a reduced sentence should be ordered as authorized by I.C.R. 35. In an attempt to support her argument, Blanc cites several statements by the district court discussing its two options as imposing sentence or instituting another period of probation. Blanc's argument is without merit.

Although the district court did discuss its two options as imposing sentence or continuing probation, the context of that discussion was regarding the court's inability to order another period of retained jurisdiction. The district court never discussed the option of imposing sentence in terms of only being able to execute the original sentence. Furthermore, moments before the sentence was ordered into execution, Blanc's counsel argued "I would suggest to the court if additional time is necessary, another 30 days or something like that, I don't know that state pen is appropriate." The district court discussed the testimony of Blanc and her probation officer and that Blanc continued to make excuses and minimize her wrongful actions. The district court also stated that it had reviewed, in detail, Blanc's original presentence investigation report and her evaluations from her two periods of retained jurisdiction. The district court discussed the goals of sentencing and concluded with a decision to order execution of Blanc's original sentence. Blanc has not demonstrated that the district court abused its discretion in ordering execution of Blanc's original sentence.

C. Sentence Review

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such

an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Blanc received three opportunities to avoid the imposition of her entire sentence in this case. Blanc received two periods of retained jurisdiction and was then granted supervised probation. The record in this case is replete with instances of Blanc minimizing her wrongful conduct and making excuses. In fact, the transcripts from Blanc's various hearings before the district court contain numerous instances in which she interrupted the court, opposing counsel, or her own attorney, almost always with an excuse. Having reviewed the record in this case, having regard for the nature of the offense, the character of the offender and the protection of the public interest, we cannot say that the district court abused its discretion in imposing a unified sentence of ten years, with a minimum period of confinement of two years, for felony injury to child.

III.

CONCLUSION

Idaho Code Section 19-2601(4) does not require an intermediate period of probation before a district court can order a defendant to serve a second retained jurisdiction. Blanc has not demonstrated that the district court abused its discretion in revoking probation and ordering execution of the original sentence or that her sentence is excessive. Therefore, Blanc's order revoking probation and requiring execution of Blanc's original sentence are affirmed.

Chief Judge GUTIERREZ, **CONCURS.**

Judge LANSING, **CONCURRING IN THE RESULT**

I agree with the majority's conclusion that the order for execution of Blanc's sentence must be affirmed, but I disagree with the analysis by which that decision is reached. I would

hold as the State urges, that the district court impermissibly purported to retain jurisdiction a second time and, therefore, lacked jurisdiction to place Blanc on probation at the end of her second rider.

The majority concludes that the district court had authority to order immediately successive periods of retained jurisdiction under the provision of I.C. § 19-2601(4) which provides that a court "may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case." In so holding, the majority disregards the final, limiting phrase of that sentence. The words "after a defendant has been placed on probation" must be given effect. If the language of a statute is clear and unambiguous, it must be enforced according to its plain, obvious and rational meaning, and a court must assume that the legislature meant what it said in the statute. *McNeal v. Idaho Pub. Utilities Comm'n*, 142 Idaho 685, 690-91, 132 P.3d 442, 447-48 (2006). A court "must give effect to every word, clause and sentence of a statute, and the construction of a statute should be adopted which does not deprive provisions of the statute of their meaning." *Athay v. Stacey*, 142 Idaho 360, 365, 128 P.3d 897, 902 (2005). Thus, we may not construe a statute in such a way as to make mere surplusage of any of its provisions. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990). The plain words of I.C. § 19-2601(4) allow a second rider only if, after the first retained jurisdiction, the defendant has been placed on probation. If the defendant then violates probation and his or her probation is revoked, the court may retain jurisdiction a second time. The statute plainly does not authorize sequential periods of retained jurisdiction without an intervening period of probation.

Accordingly, the district court here had no authority to extend its own jurisdiction beyond the initial 180-day period. The court lost jurisdiction when it did not place Blanc on probation within 180 days after sentencing and, consequently, had no jurisdiction to place Blanc on probation at the end of the second rider. Because the probation order was entered in error and without authority in the first instance, the revocation of that probation, and the consequent commitment of Blanc to the custody of the Department of Correction, must be affirmed.